2000

State of Utah v. Brad Norton : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 990026-CA
vs.	:	
BRAD NORTON,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, BEFORE THE HONORABLE STEVEN L. HANSEN, FROM A CONVICTION OF WITNESS TAMPERING, A THIRD DEGREE FELONY

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September 19, 2000

Clerk of the Court
Utah Court of Appeals
Scott M. Matheson Courthouse
450 S. State, 5th Floor
Salt Lake City, UT 84114

Re: *State v. Norton*, Case No. 990026-CA

Second Letter of Supplemental Authorities

To Court Clerk:

The State submits this letter to the Clerk of the Court pursuant to rule 24(i), Utah Rules of Appellate Procedure.

In a letter dated August 28, 2000, the State submitted a letter of supplemental authorities advising the Court of the decision in *State v. Rudolph*, 2000 UT App. 155, 3 P.3d 192, in which a panel of this Court held that a defendant need not challenge the sufficiency of the evidence in the trial court below to preserve the claim for appeal. The State had argued otherwise in Point I.A of the Brief of Appellee, pages 9-15. The State also advised the Court that the same issue was pending before the Supreme Court in *State v. Holgate*, 990313-SC.

On September 19, 2000, the Utah Supreme Court in *Holgate* held that "as a general rule, a defendant must raise [below] the sufficiency of the evidence by proper motion or objection to preserve the issue for appeal." *Holgate*, 2000 UT 74, ¶ 16. The Court held that an insufficiency claim will be heard for the first time on appeal only if the appellant can demonstrate the existence of plain error or exceptional circumstances. *Id.* at ¶¶ 11, 16, 18. *Holgate* therefore overrules the holding in *Rudolph* and controls here.

Sincerely,

Jeffrey S. Gray
Assistant Attorney General

cc: Margaret P. Lindsay, Richard Gale

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2000 UT 74

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v.

Sean Hale Holgate,
Defendant and Appellant.

No. 990313

F I L E D

September 19, 2000

Third District, Salt Lake County
The Honorable William B. Bohling

Attorneys: *Jan Graham, Att'y Gen., Scott Keith Wilson,* Jeffrey S. Gray, Asst. Att'ys Gen., Salt Lake City, for plaintiff
John S. O'Connell, Jr., Kent R. Hart, Heidi Buchi, Salt Lake City, for defendant

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RUSSON, Associate Chief Justice:

¶1 Defendant Sean Holgate was tried before a jury and convicted of murder and aggravated burglary. Holgate argues on appeal that there was insufficient evidence to sustain a conviction on either count. Holgate failed to raise the sufficiency of the evidence issue below, but argues that he should be entitled to raise such a claim initially on appeal.

BACKGROUND

¶2 *"On appeal, we review the record facts in a light most* favorable to the jury's verdict and recite the facts accordingly." State v. Brown, 948 P.2d 337, 339 (Utah 1997). We present conflicting evidence only as necessary to understand issues raised on appeal. See State v. Dunn, 850 P.2d 1201, 1206 (Utah 1993).

¶3 On the evening of June 17, 1997, Jake Gallegos, the victim, along with two friends, went to Holgate's apartment in West Valley City to purchase drugs. Holgate's friend Micah

exchange, Holgate stood directly behind Phillips and was grinning.[1]

¶6 As Gallegos turned to flee into the kitchen, Phillips fired the gun, fatally wounding Gallegos. Phillips then waved the gun back and forth in a sweeping motion, and after his gun apparently jammed, fled from Gallegos's apartment with Holgate. Holgate and Phillips ran together in a direct path across the apartment complex and parking lot to Phillips's vehicle, which was parked nearby. A friend of Phillips and Holgate, Tony Miller, waited in the driver's seat of the vehicle. When Holgate and Phillips arrived, Holgate said, "Get in, G."[2] Phillips and Holgate then climbed into the car and were driven away from the apartment complex by Miller. They departed so quickly that the vehicle's tires squealed as they sped away.

¶7 The police apprehended them shortly thereafter. When asked by the police why he thought they had been stopped, Holgate replied, "Because somebody talking shit got dealt with." A search of the car revealed the murder weapon wrapped in a stocking cap under the front passenger seat. Tests performed thereafter revealed the presence of gunpowder residue on Holgate's clothing. While being transported to the police station, Holgate asked an officer, "Does this have anything to do with what happened in West Valley?" Holgate testified at trial that he did not find out that Gallegos had been shot until two to three hours after the shooting when he was interrogated at the police station.

¶8 For his alleged participation in the killing of Gallegos, Holgate was charged with murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203, and aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203.[3] At his jury trial, Holgate alleged that he went to

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[1] Tho testified at trial that Holgate was "grinning" during the exchange at Gallegos's door. Holgate admitted that he might have grinned as he leaned against the railing outside the door.

[2] The State presented the testimony of a child who observed the suspects' flight from the scene and heard the exchange between Holgate and Phillips as they entered the vehicle. The State alleged that "G" is a street term for "gangster." Holgate claimed that Phillips, not Holgate, said, "Get in, G."

[3] Holgate and Phillips were each charged with murder and aggravated burglary for their participation in the killing of

(Continued on next page.)

Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996); State v. Lopez, 886 P.2d 1105, 1113 (Utah 1995).

¶12 We have stated that "the exceptional circumstances exception is ill-defined and applies primarily to rare procedural anomalies." State v. Dunn, 850 P.2d 1201, 1209 n.3 (Utah 1993). Holgate fails to point out any procedural anomalies or other exceptional circumstances that might justify his failure to preserve the sufficiency of the evidence in the instant case. We thus turn to his claim of plain error.

¶13 The plain error exception enables the appellate court to "balance the need for procedural regularity with the demands of fairness." State v. Verde, 770 P.2d 116, 122 n.12 (Utah 1989). "At bottom, the plain error rule's purpose is to permit us to avoid injustice." Eldredge, 773 P.2d at 35 n.8. To demonstrate plain error, a defendant must establish that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." Dunn, 850 P.2d at 1208-09.

¶14 As a general rule, to ensure that the trial court addresses the sufficiency of the evidence, a defendant must request that the court do so. The Utah Rules of Criminal Procedure state that when a defendant moves the court to arrest judgment on the basis of insufficient evidence, the directive is mandatory in that the court "shall[] arrest judgment if the facts proved or admitted do not constitute a public offense." Utah R. Crim. P. 23. In contrast, when a defendant fails to make such a motion, the directive is permissive, providing that the trial court may arrest judgment. See id.; see also Utah R. Crim. P. 17(o) ("[T]he court may issue an order dismissing any information or indictment . . . upon the ground that the evidence is not legally sufficient to establish the offense charged . . . ." (emphasis added)); Utah R. Crim. P. 24(a) ("The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." (emphasis added)).[4]

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[4] Holgate impliedly contends that these rules require the trial court to grant relief sua sponte. However, Holgate relies primarily upon federal precedent that is inapposite. Rule 29(a) of the Federal Rules of Criminal Procedure states that "[t]he court on motion of a defendant or of its own motion shall order

(Continued on next page.)

that a remediable evidentiary defect might not be perceived and corrected, thus strategically facilitating the defendant's chance for a reversal on appeal. See State v. Bullock, 791 P.2d 155, 159 (Utah 1989).

¶17 Having thus concluded that preservation is necessary as a general rule, we must determine under what circumstances it would be plain error for the trial court not to discharge a defendant on the basis of insufficient evidence. Section 77-17-3 states that when the evidentiary defect is "apparent" to the trial court, the court "shall" discharge the defendant. It necessarily follows that the trial court plainly errs if it submits the case to the jury and thus fails to discharge a defendant when the insufficiency of the evidence is apparent to the court. While it is difficult for the court on appeal to dictate when an evidentiary defect was apparent to the trial court, there is a certain point at which an evidentiary insufficiency is so obvious and fundamental that it would be plain error for the trial court not to discharge the defendant. An example is the case in which the State presents no evidence to support an essential element of a criminal charge. The plain error exception would serve to avoid a manifest injustice in such a case. Thus, to establish plain error, a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.[5]

II. PLAIN ERROR

¶18 To determine whether there was sufficient evidence to convict a defendant, we do not examine whether we believe that the evidence at trial established guilt beyond a reasonable doubt. Rather, we will conclude that the evidence was insufficient when, after viewing the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict, the evidence "is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993). If we conclude that the evidence was insufficient to convict Holgate, we must then, as discussed above, determine

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[5] Having concluded that the two recognized exceptions to the preservation rule--exceptional circumstances and plain error--govern a defendant's responsibility to preserve an insufficient evidence claim, we do not address Holgate's constitutional and policy-based arguments.

was dangerous and remained a threat. Phillips, however, did not "really know" Gallegos and had not been threatened by him.

(2) On the day of the shooting, Holgate telephoned Gallegos and informed him that he would be coming over to his apartment. Holgate and Phillips went over to Gallegos's apartment together. However, Phillips stepped aside from the doorway, out of view, so that only Holgate appeared outside when Tho opened the apartment door. When Gallegos called out to Tho to invite Holgate into the apartment, Holgate refused and replied, "No. Why don't you come out here? I need to talk to you real fast." As Gallegos approached the door and invited Holgate in, Holgate again refused to enter the apartment and instead stepped back with a grin on his face, allowing Phillips to enter the doorway and shoot Gallegos.

(3) When asked at trial if he knew that Phillips brought a gun to Gallegos's apartment, Holgate initially responded in the affirmative, "I knew he had a gun, yes." When asked a second time, however, Holgate stated that he knew Phillips owned a gun, but did not see the gun on the day of the shooting. Moreover, when Holgate stepped back from Gallegos's doorway prior to the shooting, Phillips stepped directly in front of Holgate with his hands behind his back--not in his pockets, under his shirt, or otherwise concealed from Holgate. When Phillips then raised his hands from behind his back, he was holding the weapon. Holgate testified, however, that he did not see the gun even after Phillips stepped in front of him.

(4) After the shooting, Phillips and Holgate ran down the stairs together, along a sidewalk, and across a parking lot in a relatively direct path to Phillips's car. When they arrived at the car, Holgate said to Phillips, "Get in, G." After the two young men climbed into the car, their friend Miller, who had been waiting in the driver's seat, immediately drove the vehicle away from the scene.

(5) When the car was stopped shortly after the shooting, a police officer asked Holgate why he thought they were being stopped, and Holgate responded, "Because somebody talking shit got dealt with." He later added, "Does this have anything to do with what happened in West Valley?" However, Holgate testified at trial that he did not find out that Gallegos had been shot until two to three hours after the shooting when he was interrogated at the police station.

¶23 Reviewing all of the evidence, a jury could reasonably infer the following:

jury could reasonably have inferred Holgate's intent from the circumstances of defendant's flight in addition to "other evidence of the defendant's intent . . . present in the record." Id.

(5) Holgate intended to kill Gallegos in retaliation for the threats Gallegos had made to Holgate and his family. A jury could reasonably make this inference on the basis of Holgate's statement to the police prior to his arrest that "somebody talking shit got dealt with." Moreover, a jury could interpret Holgate's statement of having "dealt with" Gallegos as inconsistent with his explanation at trial of not intending to have shot Gallegos and having no idea until two to three hours after the shooting whether Gallegos had actually been shot.

¶24 From these reasonable inferences and the evidence before the trial court, a jury could reasonably have concluded that Holgate intentionally or knowingly participated in the killing of Gallegos or intended that Phillips cause serious bodily injury to Gallegos. Thus, there was sufficient evidence to convict defendant of murder, and as a result, the trial court did not commit plain error in submitting the matter to the jury for determination.

B. Aggravated Burglary

¶25 We next consider the sufficiency of the evidence supporting Holgate's aggravated burglary conviction. To convict Holgate of aggravated burglary, the State had to prove every statutory element of the crime. Utah Code Ann. § 76-6-202(1) (1999) defines the crime of burglary as follows: "A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a

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[6] (Footnote continued.)
v. Jamison, No. 81,644, 2000 Kan. LEXIS 607, *10; State v. Tucker, 494 N.W.2d 572, 578 (Neb. 1993); State v. Meloon, 469 A.2d 1316, 1318 (N.H. 1983); Commonwealth v. Lewis, 419 A.2d 544, 546-47 (Pa. Super. Ct. 1980); see also 1 Wharton's Criminal Evidence § 214, at 450 (Charles E. Torcia ed., 13th ed. 1972) ("Flight by itself is not sufficient to establish the guilt of the defendant, but is merely a circumstance to be considered with other factors as tending to show a consciousness of guilt and therefore guilt itself. That there is evidence which tends to weaken the inference of guilt implicit in flight does not render the evidence of flight inadmissible, but is merely to be considered by the jury in weighing the effect of such flight." (footnotes omitted)).

Phillips in entering Gallegos's apartment and intended that Phillips commit a felony or assault inside the apartment. Thus, there was sufficient evidence to convict Holgate of aggravated burglary, and as a result, it was not error for the trial court to submit the aggravated burglary charge to the jury for determination.

CONCLUSION

¶29 While the sufficiency of the evidence may be reviewed for plain error, Holgate has not demonstrated that the trial court plainly erred in submitting his case to the jury because he has failed to establish, as a threshold matter, that there was insufficient evidence to support either the murder charge or the aggravated burglary charge. We therefore affirm both of Holgate's convictions.

¶30 Chief Justice Howe, Justice Durham, Justice Durrant, and Justice Wilkins concur in Associate Chief Justice Russon's opinion.

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TABLE OF AUTHORITIES

Statutory Provisions

Cases Cited

IN THE UTAH COURT OF APPEALS

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vs.	:	
	:	
BRAD NORTON,	:	Priority No. 2
	:	
Defendant/Appellant.	:	
	:	

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the evidence was sufficient to support Norton's conviction for witness tampering under Utah Code Annotated § 76-8-508? When reviewing evidence for sufficiency this Court should "review the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict of the jury" and reverse Norton's conviction if "the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Tolman*, 775 P.2d 422, 424 (Utah App), *cert. denied*, 783 P.2d 53 (Utah 1989).

2. Whether the trial court committed plain error in refusing to sever the witness tampering charge from the aggravated assault charge without instructing the jury of their duty to decide each count individually. To establish plain error Norton must show "(i)[a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

CONTROLLING STATUTORY PROVISIONS

All relevant statutory and constitutional provisions are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Brad Norton appeals from the judgment, sentence and commitment of the Honorable Steven L. Hansen, after a jury trial at which Norton was convicted of Aggravated Assault, a second degree felony, and Witness Tampering, a third degree felony.[1]

B. Trial Court Proceedings and Disposition

On or about May 11, 1998, Brad Norton was charged by Information in Fourth District Court with: Count I--Aggravated Assault, a second degree felony, in

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[1]This Court on Norton's motion, has previously dismissed this appeal in regards to Norton's aggravated assault conviction.

violation of Utah Code Annotated § 76-5-103;[2] Count II--Evidence Tampering, a second degree felony, in violation of Utah Code Annotated § 76-8-510; Count III--Witness Tampering, a third degree felony, in violation of Utah Code Annotated § 76-8-508 (R. 9-10)[3].

On May 12 & June 3, 1998, a preliminary hearing was conducted before Judge Lynn W. Davis and Norton was bound-over on all charges and "not guilty" pleas were entered (R. 19-20, 47-49).

On July 28, 1998, Norton filed a Motion to Sever Count III (witness tampering) from Counts I-II on grounds that it was not part of the same criminal empisode as the other counts in the Information and that evidence regarding an unrelated crime or bad act would prejudice Norton at trial (R. 78). This issue was argued at a pre-trial conference on August 11, 1998, before Judge Hansen, who after deliberation, denied the motion (R. 92-93, 94, 122-25, 262).

On August 18-21, 1998, a jury trial was conducted and Norton was convicted of Count I (aggravated assault) and Count III (witness tampering) (R. 152-53, 155-58, 263-66).

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[2]The State sought to enhance Count I with a gang enhancement pursuant to Utah Code Annotated § 76-3-203.1. However, the trial court declined to impose the enhancement at sentencing (R. 249-50).

[3]An Amended Information was filed on June 3, 1998 (R. 50-52). However, the only amendment concerned the date of offense on the witness tampering charge.

On November 30, 1998, Norton was sentenced to concurrent terms of 1-15 years and 0-5 years in the Utah State Prison (R. 246-47, 267). On December 28, 1998, Norton filed a Notice of Appeal with the Fourth District Court and this action commenced (R. 255).

STATEMENT OF RELEVANT FACTS

A. Background

On the night of April 10, 1998, Brad Norton, Jacqui Bingham, Bobby Garcia, Jordan Butler and several others became involved in a dispute between Durin Wellesly & Laura Vogt and Wade Willis & Heny Rivera. The two groups met at the Colony Inn in Provo, Utah. A fight began and Heny Rivera was beat-up and stabbed. Most of the individuals involved were charged with assault or aggravated assault. Brad Norton was tried for aggravated assault for stabbing Rivera. Norton was convicted by a jury. Norton was also charged with evidence tampering and witness tampering. Norton was acquitted by the jury of evidence tampering and convicted of witness tampering.

B. Testimony of Jacqui Bingham

Jacqui Bingham testified that on April 14, 1998, she was in jail because of the incident at the motel (R. 264 at 366-67). On the morning of the 14th, Bingham testified that she, Norton, Bobby Garcia and Jordan Butler were transported from the jail to the courthouse in Provo (R. 264 at 367). While in the transport van on the way to court,

Bingham testified that Norton told her with gritted teeth that if she testified against him then he would go to prison (R. 264 at 368). At court, Bingham was released on the charges on her own recognizance (R. 264 at 369).

On the trip back to the jail, Bingham testified that Norton and Garcia gave her dirty looks outside the courthouse (Id.). In the van on the return trip, Bingham heard Norton and Garcia talking (R. 264 at 370). Bingham heard Norton say he was going to "F--k me up the asshole" and Garcia said "without vaseline so it hurts" (R. 264 at 371). Counsel for the State asked Bingham if she considered these comments as constituting a threat that she would be sodomized if she testified in this case (R. 264 at 373). Bingham responded "No... they were just trying to scare me" (R. 264 at 373). Bingham testified that she "kind of" saw a relationship between Norton's comment that he would go to jail if she testified and his comment on the way back to the jail (R. 264 at 373).

C. Testimony of Jordan Butler

Jordan Butler testified that he was transported from the jail to court in a big van with Bingham, Norton and Garcia (R. 264 at 493-94). Butler testified that he did not hear Norton say anything to Bingham on the way to court (R. 264 at 494). On the way back to the jail, Butler testified that he was sitting close to Norton and Garcia while Bingham sat in the front 8-10 feet away (R. 264 at 495). Butler testified that they were all upset (R. 264 at 496). Butler testified that Norton told him and Garcia that they

"better not get on the stand and talking all this bullshit" (R. 264 at 496-97). Butler testified that Norton's comments were loud enough for him to hear them and possibly loud enough for Bingham to hear them (R. 264 at 497). Butler also testified that he did not hear Norton make any comments to Bingham (Id.). Butler stated that he did not hear anyone on the bus say "I'm going to f--k you in the ass" (R. 264 at 513).

D. Testimony of Bobby Garcia

Garcia testified that he was transported from the jail to court in a big van with Bingham, Norton and Butler (R. 264 at 542). Garcia testified that prior to getting into the van, he recalled Norton saying to Bingham "Bitch, you better not testify" or words to that effect (R. 264 at 543). On the way back to the jail from Court, Garcia testified that he heard Norton threaten Bingham about testifying against him (R. 264 at 547). Garcia testified that Bingham was 10-15 feet from Norton when the comments were made (R. 264 at 557). Garcia testified that he did not hear Norton make threats of a sexual nature to Bingham (R. 264 at 558).

E. Testimony of Brad Norton

Norton testified that he was "talking smack" on the way from the jail to the court about people giving false testimony (R. 265 at 680-81). However, Norton denied making any specific comments to Bingham and or making any faces at her (R. 265 at 683).

SUMMARY OF ARGUMENT

One, Norton asserts that the evidence was insufficient to sustain his conviction for witness tampering.

Two, Norton asserts that the trial court committed plain error in joining the witness tampering charge to the aggravated assault charge without mitigating the prejudice of the joinder by instructing the jury as to their duty to decide each charge individually.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN NORTON'S CONVICTION OF WITNESS TAMPERING

Along with evidence tampering and aggravated assault, Norton was charged with witness tampering under Utah Code Annotated § 76-8-508 for communicating threats of bodily injury to Jacqui Bingham in order to cause or induce her to testify falsely or to withhold testimony (Jury Instruction #18(g) R. 130). Norton asserts that the evidence presented at trial was insufficient to sustain his conviction of witness tampering. When reviewing evidence for sufficiency this Court should "review the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict of the jury" and reverse Norton's conviction if "the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have

entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Tolman*, 775 P.2d 422, 424 (Utah App), *cert. denied*, 783 P.2d 53 (Utah 1989).

Norton has marshaled the evidence in his Statement of Facts but does so again. Jacqui Bingham testified that on the way to court from jail on or about April 14, 1998, Norton told her that if she testified against him that he would go to prison (R. 264 at 368). Bingham also testified that Norton and Garcia gave her dirty looks outside the courthouse and that on the trip back to the jail she heard Norton say he was going to "F--k [her] up the asshole" with Garcia adding "without vaseline so it hurts" (R. 264 at 371). However, neither Butler nor Garcia--who were sitting next to Norton on the trips--heard Norton make these comments. Moreover, both Garcia and Butler testified that Bingham was sitting 8-15 feet away from Norton in the van (R. 264 at 495, 557).

Garcia, however, testified that he recalled Norton say "Bitch, you better not testify" to Bingham prior to getting into the van and he recalled Norton making similar statements to Bingham on the return trip to the jail (R. 264 at 543). Garcia did not hear Norton make threats of a sexual nature to Bingham and he denied making any derogatory comments to her (R. 264 at 558).

On the other hand, Butler testified that he did not hear Norton say anything to Bingham on the way to court (R. 264 at 494). Butler testified that they were all upset on the way back to the jail because their bail had been set so high (R. 264 at 496).

Butler testified that Norton told him and Garcia that they "better not get on the stand and talking all this bullshit" (R. 264 at 496-97). Butler testified that during these comments, Bingham was sitting 8-10 feet away from Norton; and that while he could hear Norton's comments it was only possible that Bingham could (R. 264 at 495, 497). Butler also testified that he did not hear Norton make any specific comments to Bingham nor did he hear anyone on the van say "I'm going to f--k you in the ass" (R. 264 at 513).

Norton admitted to "talking smack" on the van about people giving false testimony; however, he denied making any specific comments to Bingham (R. 265 at 683). This "talking smack" admission is supported by Bingham's admission that she did not consider Norton's comments as a threat that she would be sodomized if she testified (R. 264 at 373) and that she only "kind of" saw a relationship between Norton's comment that he would go to jail if she testified and his sexual innuendo on the way back to the jail (R. 264 at 373).

Norton concedes that at the time the alleged witness tampering occurred, he knew that an official proceeding or investigation was pending and that Bingham was likely to be a witness. However, Norton asserts that the evidence was insufficient to establish that he communicated to Bingham "a threat that a reasonable person would believe to be a threat to do bodily injury" to her in an attempt to induce or otherwise

cause Bingham to testify falsely or to withhold testimony or information. *See* Jury Instruction #18(g) (R. 130).

One, Norton denied making any specific comments to Bingham. Two, Bingham testified that she did not feel threatened by Norton's comments. Three, Norton did not specifically request that Bingham testify falsely or withhold testimony and Bingham testified that she only "kind of" saw a relationship between Norton's comment that he would go to jail if she testified and his sexual innuendo on the way back to the jail. Four, the comments which Garcia testified that Norton made to Bingham were not supported by either Bingham or Butler's testimony. Five, neither Garcia nor Butler--who were sitting next to Norton--heard him make comments of a sexual nature to Bingham. Six, the comments that Butler heard from Norton were directed more at himself and Garcia and consisted of statements that nobody should testify falsely.

Norton asserts that the testimony elicited at trial was so inconclusive and improbable as to create reasonable doubt that he tampered with Bingham. Accordingly, Norton asks that this Court reverse his conviction of witness tampering because the evidence was insufficient to sustain it. *Cf. State v. Burk*, 839 P.2d 880, 885 (Utah App. 1992) (Defendant specifically told witness to testify falsely); *State v. Tolman,* 775 P.2d at 424-25 (Defendant specifically told witness to withhold and destroy document).

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR IN REFUSING TO SEVER THE WITNESS TAMPERING CHARGE FROM THE AGGRAVATED ASSAULT CHARGE WITHOUT INSTRUCTING THE JURY OF THEIR DUTY TO DECIDE EACH COUNT INDIVIDUALLY

Prior to trial, Norton filed a Motion to sever the witness tampering charge from the aggravated assault and evidence tampering charges on grounds that it was not part of the same criminal episode and that without the severance Norton would be prejudiced by the joinder (R. 78, 262). After argument, the trial court denied Norton's motion (R. 122-25).

The trial court concluded: One, that the charges of aggravated assault and witness tampering were properly charged in the same information because they are "connected together in their commission" as provided in Utah Code Annotated § 77-8a-1(1)(a) and *State v. Smith*, 927 P.2d 649, 653 (Utah App. 1996), *cert. denied*, 937 P.2d 136 (Utah 1997) (R. 123). Two, that severance was not required because "the probative value of the evidence in support of each count for the other charged counts substantially outweighs any unfair prejudice that might result" under Rules 403 & 404(b) of the Utah Rules of Evidence and *State v. Smith* (R. 123-24).

In *Smith*, this Court concluded that severance of manslaughter, failing to report a dead body and evidence tampering charges was not required because the charges were "connected together in their commission" under Utah Code Annotated § 77-8a-1(1)(a). 927 P.2d at 653. Specifically, this Court held that "When criminal conduct resulting in

a second charge is precipitated by a previous charge, the two are sufficiently 'connected together' to allow consolidation for trial." *Id.* Norton concedes that under the parameters set forth by this Court in *Smith*, the charges of witness tampering and aggravated assault are sufficiently connected together to allow joinder because the witness tampering charge was precipitated by the aggravated assault charge.

In *Smith*, this Court also concluded that the defendant was not prejudiced by the joinder because evidence of the other crimes would have been admissible in a separate trial under Rule 404(b) and because the probative value of the evidence outweighed any prejudicial tendency. 927 P.2d at 654. Norton asserts, however, that the probative value of all of the aggravated assault evidence did not outweigh the prejudicial effect of the evidence in relation to the witness tampering charge. In a separate trial, Bingham, Garcia and Butler could have provided a sufficient context within to place the witness tampering charge without prejudicing the jury on the witness tampering charge by providing them with all of the aggravated assault evidence. Moreover, a trial court "should sever charges when it concludes that 'prejudice to the defendant outweighs considerations of economy and practicalities of judicial administration, with doubts being resolved in favor of severance.'" *Smith*, 927 P.2d at 653 (quoting *State v. Jaimez*, 817 P.2d 822, 825 (Utah App. 1991).

In *Smith*, this Court conceded that admission of the manslaughter evidence would prejudice the defendant in regards to the other charges. 927 P.2d at 654.

However, this Court found that the trial court mitigated any prejudicial effect of joinder in *Smith* by specifically instructing the jury that they must decide each count individually and ensure that the State had proved every element of each charge beyond a reasonable doubt. *Id.* (citations omitted).

While the trial court in this case gave reasonable doubt instructions to the jury (R. 130, 131, 134-35), the trial court did not instruct the jury as to their duty to decide each count individually. Norton asserts that the trial court's failure to so instruct the jury constituted plain error which requires reversal. To establish plain error Norton must show "(i)[a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

Norton asserts that the trial court committed obvious error in failing to instruct the jury on their duty to decide each count individually. The trial court based its denial of Norton's motion to sever largely on this Court's decision in *Smith*. Accordingly, the trial court was fully apprized of the necessity to mitigate against the "natural prejudice" of the aggravated assault evidence. Moreover, Norton was clearly harmed by the trial court's error as their was no mitigation or minimization of the natural prejudice of the evidence. Accordingly, Norton requests that this Court reverse his conviction for witness tampering because the trial court committed plain error in joining the witness tampering charge to the aggravated assault charge without instructing the jury of their

duty to decide each charge individually and because Norton was prejudiced by the joinder without such a mitigating instruction.

CONCLUSION AND PRECISE RELIEF SOUGHT

~~Stanley~~ Norton respectfully asks that this Court reverse his convictions~~, because~~ for witness tampering.

RESPECTFULLY SUBMITTED this 31 day of January, 2000.

Margaret P. Lindsay
Counsel for Norton

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 31 day of January, 2000.

ADDENDA

False or inconsistent material statements.
...on is guilty of a felony of the second degree if in any ...proceeding:
(1) He makes a false material statement under oath or ...rmation or swears or affirms the truth of a material ...tement previously made and he does not believe the ...ment to be true; or
(2) He makes inconsistent material statements under ... or affirmation, both within the period of limitations, ...of which is false and not believed by him to be true.
1997

False or inconsistent statements.
...on is guilty of a class B misdemeanor if:
(1) (a) he makes a false statement under oath or affirmation or swears or affirms the truth of the statement previously made and he does not believe the ...tatement to be true if:
(i) the falsification occurs in an official proceeding, or is made with a purpose to mislead a public servant in performing his official functions; or
(ii) the statement is one which is authorized by law to be sworn or affirmed before a notary or other person authorized to administer oaths; or
(b) he makes inconsistent statements under oath or affirmation, both within the period of limitations, ...one of which is false and not believed by him to be ...true.
(2) A person is not guilty under this section if the ...ation is retracted before it becomes manifest that ...lsification was or would be exposed. 1997

Written false statement.
...n is guilty of a class B misdemeanor if:
(1) He makes a written false statement which he does ...lieve to be true on or pursuant to a form bearing a ...ation authorized by law to the effect that false ...ents made therein are punishable; or
(2) With intent to deceive a public servant in the ...mance of his official function, he:
(a) Makes any written false statement which he ...es not believe to be true; or
(b) Knowingly creates a false impression in a writ... application for any pecuniary or other benefit by ...itting information necessary to prevent state...nts therein from being misleading; or
(c) Submits or invites reliance on any writing ...h he knows to be lacking in authenticity; or
(d) Submits or invites reliance on any sample, ...mmen, map, boundary mark, or other object which ...nows to be false.
...person shall be guilty under this section if he ... the falsification before it becomes manifest that ...ation was or would be exposed. 1973

...se or inconsistent statements — Proof of ...lsity of statements — Irregularities no de...ce.
...prosecution for a violation of Subsection 76-8-...-503(1)(a), falsity of a statement may not be ...ly through contradiction by the testimony of a ...
...utions for violation of Subsection 76-8-502(2) or ..., it need not be alleged or proved which of the ...se but only that one or the other is false and ... the defendant to be true.
... a defense to a charge under this part that the ...ation was administered or taken in an irregular ...
1997

76-8-506. Provision of false information to law enforcement officers, government agencies, or specified professionals.
A person is guilty of a class B misdemeanor if he.
(1) knowingly gives or causes to be given false information to any law enforcement officer with a purpose of inducing the officer to believe that another has committed an offense; or
(2) knowingly gives or causes to be given to any law enforcement officer, any state or local government agency or personnel, or to any person licensed in this state to practice social work, psychology, or marriage and family therapy, information concerning the commission of an offense, knowing that the offense did not occur or knowing that he has no information relating to the offense or danger 1988

76-8-507. False personal information to peace officer.
A person commits a class C misdemeanor if, with intent of misleading a peace officer as to his identity, birth date, or place of residence, he knowingly gives a false name, birth date, or address to a peace officer in the lawful discharge of his official duties. 1983

76-8-508. Tampering with witness — Retaliation against witness or informant — Bribery — Communicating a threat.
(1) A person is guilty of a third degree felony if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:
(a) testify or inform falsely,
(b) withhold any testimony, information, document, item;
(c) elude legal process summoning him to provide evidence; or
(d) absent himself from any proceeding or investigation to which he has been summoned.
(2) A person is guilty of a third degree felony if he.
(a) commits any unlawful act in retaliation for anything done by another as a witness or informant;
(b) solicits, accepts, or agrees to accept any benefit in consideration of his doing any of the acts specified under Subsection (1); or
(c) communicates to a person a threat that a reasonable person would believe to be a threat to do bodily injury to the person, because of any act performed or to be performed by the person in his capacity as a witness or informant in an official proceeding or investigation. 1988

76-8-508.5. Tampering with juror — Retaliation against juror — Penalty.
(1) As used in this section "juror" means a person.
(a) summoned for jury duty; or
(b) serving as or having served as a juror or alternate juror in any court or as a juror on any grand jury of the state.
(2) A person is guilty of tampering with a juror if he attempts to or actually influences a juror in the discharge of the juror's service by:
(a) communicating with the juror by any means, directly or indirectly, except for attorneys in lawful discharge of their duties in open court;
(b) offering, conferring, or agreeing to confer any benefit upon the juror; or
(c) communicating to the juror a threat that a reasonable person would believe to be a threat to injure:
(i) the juror's person or property; or
(ii) the person or property of any other person in whose welfare the juror is interested.

...ers. The suspect shall have access to and may make ... the record and any photographs taken of him or any ...sons in connection with the lineup. 1980

CHAPTER 8a

CRIMINAL OFFENSE CHARGES

...under of offenses and of defendants.

... Joinder of offenses and of defendants.
...o or more felonies, misdemeanors, or both, may be ... in the same indictment or information if each offense ...ate count and if the offenses charged are:
... based on the same conduct or are otherwise con...ed together in their commission; or
... alleged to have been part of a common scheme or ...
... When a felony and misdemeanor are charged to...her the defendant is afforded a preliminary hearing ...respect to both the misdemeanor and felony offenses.
... Two or more defendants may be charged in the ... indictment or information if they are alleged to have ...icipated in the same act or conduct or in the same ...inal episode.
... The defendants may be charged in one or more ...ts together or separately and all of the defendants ... not be charged in each count.
... When two or more defendants are jointly charged ... any offense, they shall be tried jointly unless the ...rt in its discretion on motion or otherwise orders ...arate trials consistent with the interests of justice.
... The court may order two or more indictments or ...rmations or both to be tried together if the offenses, ... the defendants, if there is more than one, could have ...n joined in a single indictment or information.
... The procedure shall be the same as if the prosecu...n were under a single indictment or information.
... If the court finds a defendant or the prosecution is ...judiced by a joinder of offenses or defendants in an ...ictment or information or by a joinder for trial to...her, the court shall order an election of separate trials ...parate counts, grant a severance of defendants, or ...vide other relief as justice requires.
... A defendant's right to severance of offenses or ...ndants is waived if the motion is not made at least ... days before trial. In ruling on a motion by defendant ... severance, the court may order the prosecutor to ...lose any statements made by the defendants which he ...nds to introduce in evidence at the trial. 1990

CHAPTER 9

UNIFORM ACT ON FRESH PURSUIT

Authority of peace officer of another state.
Procedure after arrest.
Authority of peace officer of this state beyond normal jurisdiction.

... Authority of peace officer of another state.
... officer of another state or the District of Columbia ...ers this state in fresh pursuit and continues in fresh ... of a person in order to arrest him on the ground that ...easonably believed to have committed a felony in ...state, has the same authority to arrest and hold a person in custody as a peace officer of this state. Fresh pursuit does not require instant action, but pursuit without unreasonable delay. 1980

77-9-2. Procedure after arrest.
An officer who has made an arrest pursuant to Section 77-9-1 shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made. The magistrate shall conduct a hearing to determine the lawfulness of the arrest. If he finds the arrest was lawful, the magistrate may commit the person arrested for a reasonable time or may admit the person to bail pending extradition proceedings. 1980

77-9-3. Authority of peace officer of this state beyond normal jurisdiction.
(1) Any peace officer duly authorized by any governmental entity of this state may exercise a peace officer's authority beyond the limits of such officer's normal jurisdiction as follows:
(a) When in fresh pursuit of an offender for the purpose of arresting and holding that person in custody or returning the suspect to the jurisdiction where the offense was committed;
(b) When a public offense is committed in such officer's presence;
(c) When participating in an investigation of criminal activity which originated in such officer's normal jurisdiction in cooperation with the local authority;
(d) When called to assist peace officers of another jurisdiction.
(2) Any peace officer, prior to taking such authorized action, shall notify and receive approval of the local law enforcement authority, or if such prior contact is not reasonably possible, notify the local law enforcement authority as soon as reasonably possible. Unless specifically requested to aid a police officer of another jurisdiction or otherwise as provided for by law, no legal responsibility for a police officer's action outside his normal jurisdiction and as provided herein, shall attach to the local law enforcement authority. 1980

CHAPTER 10

FORMATION OF THE GRAND JURY

(Repealed by Laws 1990, ch. 318, § 23.)

77-10-1 to 77-10-8. Repealed.

CHAPTER 10a

GRAND JURY REFORM

Section
77-10a-1. Definitions.
77-10a-2. Panel of judges — Appointment — Membership — Ordering of grand jury.
77-10a-3. Scope of grand jury inquiry
77-10a-4. Number of members — Number required for indictment.
77-10a-5. Grand jurors — Qualification and selection — Limits on disclosure.
77-10a-6. Repealed.
77-10a-7. Selection of grand jurors — Notice — Examination — Qualification — Alternates.
77-10a-8. Challenge of prospective grand jurors — Failure to comply in selection of jurors — Remedies.
77-10a-9. Oath for grand jurors.
77-10a-10. Charge of grand jury — Rights and duties.

INSTRUCTION NO. 18 (6)

In order for you find the Defendant Brad Norton guilty of the offense of **Count III: Witness Tampering,** you must find that each of the following essential elements of the crime charged in the Information have been established beyond a reasonable doubt:

1. The Defendant Brad Norton

2. On or about April 14, 1998

3. In Utah County, Utah

4. Communicated to a person a threat that a reasonable person would believe to be a threat to do bodily injury to that person

5. Because of any act performed or to be performed by the person in her capacity as a witness or informant in an official proceeding or investigation or, knowing that an official proceeding or investigation was pending or about to be instituted, attempted to induce or otherwise cause a person to testify or inform falsely or withhold testimony or information.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the essential elements of the crime charged, you should find the defendant Brad Norton not guilty of this offense. But if the State has proved to your satisfaction beyond a reasonable doubt all of the essential elements of the offense as setforth above, then you should find the defendant Brad Norton guilty of the offense of Witness Tampering as charged in the Information.

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JAMES R. TAYLOR #3199
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(801) 370-8026

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

STATE OF UTAH,	:	
	:	**FINDINGS OF FACT AND**
Plaintiff,	:	**CONCLUSIONS OF LAW**
vs.	:	
BRAD NORTON,	:	**Case No. 981403928 FS**
Defendant(s).	:	**Judge Steven L. Hansen**

This matter came before the Court, the Honorable Steven L. Hansen presiding, on the Defendant's motion to sever Count III for a separate trial. The defendant was present, in person, and represented by Steven B. Killpack. The State was represented by Deputy Utah County Attorney James R. Taylor. Being advised in the premises the Court makes and enters the following:

FINDINGS OF FACT

1. The Defendant is charged with committing an aggravated assault in south Provo in the early morning hours of April 11, 1998. The State alleges that immediately after the assault Norton fled to Spanish Fork and participated in cleaning and hiding the assault weapon, a knife, within an hour of the assault. Norton was arrested the following day.

A co-defendant Robert Garcia was also arrested over the weekend and placed in the Utah County Jail. Jacqui Bingham, a young woman who was present at the time of the assault, was also arrested and placed in the county jail. All three, defendant, Garcia and Bingham were transported together to the Fourth District Court in Provo on Monday Morning, April 13 to have bail set. The court imposed substantial bail upon both Defendant and Garcia while Ms. Bingham was released on her own recognizance upon recommendation of the prosecuting attorney.

2. The State alleges that after the court hearing the three defendants were placed back into a van for transportation back to the jail. It was during that post-hearing transportation that the State alleges defendant and Garcia made the comments that a reasonable person would interpret as a threat to do bodily injury to keep her from informing or providing testimony against them.

3. The allegation of the State is that defendant and Garcia threatened to forcibly and painfully sodomize Bingham if she testified against them.

4. If established as alleged, the witness tampering offense is an attempt to somehow conceal the previous criminal activities of the Defendant. The conduct charged in the witness tampering count was precipitated by the Defendant's conduct in the assault charge.

5. If the cases were to be tried separately, evidence of each would be admissible in the trial of the other. Evidence of the assault including Ms. Bingham's presence and observations and the subsequent arrest, transportation and setting of bail in each other's presence

demonstrates motive, opportunity, intent and knowledge on the charge of witness tampering. Evidence of the threat or attempt to make what Ms. Bingham knew about the assault would be admissible at the assault trial to show guilty knowledge or consciousness of guilt of the assault.

6. The assault evidence is probative and essential evidence for the witness tampering charge. Indeed, without the evidence of the assault, including the defendant's participation and Bingham's presence and observation together with the subsequent arrest and transportation to court, together, a jury would be unable to understand that the threat was an attempt to conceal evidence.

7. Inasmuch as the evidence of each of the crimes would be admissible in a separate trial of the other crimes, the prejudice to the Defendant from having the jury hear the evidence is not unfairly prejudicial.

From the foregoing the Court makes the following:

CONCLUSIONS OF LAW

1. The felony charges of Aggravated Assault and Witness Tampering are properly charged in the same information in that they are "connected together in their commission" as provided in section 77-8a-1(1)(a), Utah Code Annotated, 1953 as amended, and State v. Smith, 921 P 2d 649 at 653 (Utah Ap. 1996).

2. Severance of the counts for trial is not required since the probative value of the evidence in support of each count for the other charged counts substantially outweighs any unfair prejudice that might

result, Rules 403 and 404(b) of the Utah Rules of Evidence and State v. Smith, supra.

DATED this 20 day of August, 1998.

BY THE COURT:

STEVEN L. HANSEN
DISTRICT JUDGE

APPROVED AS TO FORM:

STEVEN B. KILLPACK
ATTORNEY FOR DEFENDANT